Office - Supreme Court, U.S.
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SEP 2 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1861

IN THE

Supreme Court of the United States

October Term, 1982

V. LOUISE McCARREN, ROSALYN L. HUNNEMAN, AND SAMUEL S. BLOOMBERG, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE STATE OF VERMONT PUBLIC SERVICE BOARD, AND THE TOWN OF CAVENDISH, VERMONT,

Petitioners,

v.

TOWN OF SPRINGFIELD, VERMONT AND VERMONT PUBLIC POWER SUPPLY AUTHORITY,

Respondents.

SUPPLEMENTAL BRIEF

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August 31, 1983

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The Court of Appeals' Decision Upholding Federal Question Jurisdiction Is in Conflict with this Court's Decision in Franchise Tax Board v. Construction Laborers Vacation Trust, 51 U.S.L.W. 4945 (U.S. June 24, 1983).

The Second Circuit's decision upholding federal question jurisdiction under 28 U.S.C. §§1331, 1337 conflicts with this Court's recent decision in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 51 U.S.L.W. 4945 (U.S. June 24, 1983). In *Franchise Tax Board*, this Court held that, under the doctrine of *Skelly Oil*, the federal courts do not have original jurisdiction to entertain suits by the

states to declare the validity of their regulations in the face of possibly pre-emptive federal law. *Id.*, at 4951. The doctrine of *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), is the proposition that "... 'if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking'." *Id.*, at 4949 (citations omitted) *Franchise Tax Board* makes clear, what *Public Service Commission v. Wycoff*, 344 U.S. 237, 248 (1952), had questioned: as a general rule, federal jurisdiction does not exist where a party seeks a declaration that he is immune, by virtue of federal law, from a non-federal claim. Jurisdiction is lacking even if the federal defense is pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.

Springfield, in its federal court action, sought an adjudication of the pre-emptive effect of the Federal Power Act on the Board's §248 jurisdiction; a question of federal law. But, as in *Wycoff* and *Franchise Tax Board*, the actual controversy was the application of the state statute. The federal claim was asserted only as a defense to potential Board enforcement of its ruling, a state law claim.

That Springfield, rather than the state, brought suit here does not create an exception to the general rule. The opinion in *Franchise Tax Board* noted that the Construction Laborers Vacation Trust, as opposed to the Tax Board, might have obtained federal jurisdiction for resolution of the pre-emption question under "the doctrine applied in some cases that a person subject to a scheme of federal regulation may sue in federal court to enjoin application to him of conflicting state regulations, and a declaratory state judgment action by the same person does not necessarily run afoul of the *Skelly Oil* doctrine." *Franchise Tax*

Board v. Construction Laborers Vacation Trust, 51 U.S.L. W. 4985, 4950, n. 20 (U.S. June 24, 1983).

The doctrine that a person subject to conflicting state and federal regulation may sue in federal court for an injunction or a declaratory judgment is not applicable here. Neither the Board nor FERC has yet acted, and Springfield has not been subjected to any conflicting state and federal requirements.

The Court observed in *Franchise Tax Board* that jurisdictional legislation must be interpreted "with an eye to practicality and necessity." *Id.*, at 4951. Here there is simply no good reason why the federal courts should entertain Springfield's suit to overturn the Board's ruling. Springfield would not be prejudiced by an inability to come to federal court. The failure of the federal courts to exercise jurisdiction would not subject Springfield to the risk of liability, or to the expense of complyng with §248 review prior to being able to raise its federal defense. Springfield has already litigated its federal defense before the Board, and the Board's ruling could have been immediately appealed to the Vermont Supreme Court.

Springfield's claim of federal pre-emption is necessarily defensive in nature. Any effort by the Board to enforce its ruling would be based on state law alone, and the federal court would not have jurisdiction. The decision in *Franchise Tax Board* establishes that Springfield's attempt to use the federal courts to assert its federal defense to the enforcement of Vermont law does not create federal question jurisdiction.

CONCLUSION

In view of the foregoing and the reasons set forth in the petition, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Dated: August 31, 1983.

Respectfully submitted,

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